No. 11591

In the United States Circuit Court of Appeals for the Ninth Circuit

FRED GERARD AND ROSE GERARD, APPELLANTS

v.

UNITED STATES OF AMERICA, J. W. SHERBURNE, ET AL., APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

A. DEVITT VANECH,
Assistant Attorney General.

JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C.

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CITATIONS

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OPINION BELOW

The opinion of the district court in the first case which was dismissed on the ground that the United States, an indispensable party, had not been made a party, is reported in 62 F. Supp. 28. Its opinion in the instant case is reported in 69 F. Supp. 940.

JURISDICTION

This is a suit by which appellants seek to quiet title to certain lands against the United States and other parties. For the reasons stated in the Argument *infra,* it is believed that the district court did not have jurisdicton of this suit. Final judgment of dismissal for lack of jurisdiction was entered on February 8, 1947, and notice of appeal therefrom

was filed March 27, 1947 (R. 39–40).[1] The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the United States has consented to be sued in an action seeking to establish immunity from taxation of allotments made to certain Indians.

STATUTE INVOLVED

Section 1 of the Act of August 15, 1894, c. 270, 28 Stat. 305, as amended, 25 U. S. C. sec. 345, provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any

[1] The judgment of dismissal is included in the record filed in this Court but was inadvertently omitted from the printed record.

> law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

Section 24 of the Judicial Code, 28 U. S. C. sec. 41 provides:

> The district courts shall have original jurisdiction as follows: * * *
>
> Twenty-fourth. Of all actions, suits or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.
>
> And the judgement or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him: * * *.

STATEMENT

This is an appeal from a judgment dismissing, upon motion of the defendants, a suit brought against the United States and various individuals by which appellants, Blackfeet Indians, sought to establish immunity of their lands from State taxation and to cancel certain tax deeds. Appellants sought to bring a similar action against some of the other defendants without joining the United States but this suit was dismissed on the ground that the United States was an indis-

pensable party, *Gerard* v. *Mercer,* 62 F. Supp. 28 (D. Mont. 1945). The facts, as alleged in the present complaint which was thereupon filed, may be summarized as follows:

Appellants were each allotted lands within the Blackfeet Indian Reservation and in February 1918, trust patents were issued to them pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388 and treaties with the Blackfeet Indians (R. 3–7). In June 1918, fee patents were issued to appellants in place of the trust patents (R. 7). The complaint alleged that these patents violated the terms of the trust and were issued without application by or consent of appellants (R. 7–8). Subsequently, Glacier County, Montana, levied taxes upon the lands which were not paid and the lands were sold to W. R. McDonald in 1930 (R. 10). The complaint alleged that the lands were not taxable and could not be mortgaged or conveyed by appellants without approval of appropriate federal officials (R. 11). It is asserted that the various individual defendants claim some interest in the land apparently through the deed to McDonald (R. 10, 12). The relief sought was that a decree be entered determining that the lands are immune from taxation and that appellants' trust title be quieted as against the claims of the individual defendants (R. 13–14).

The United States moved to dismiss for lack of jurisdiction and motions to dismiss on various grounds were filed by the other defendants (R. 15–18, 24–25). On February 8, 1947, the court wrote an opinion con-

cluding that it lacked jurisdiction of the action (R. 26–34). The action was accordingly dismissed and this appeal followed (R. 35–40).

ARGUMENT

The trial court correctly dismissed the suit as against the United States

Appellants rely upon the 1894 Act and Section 24 (24) of the Judicial Code as constituting a waiver of the immunity of the Federal Government from suit. The code provision represents simply an incorporation in the Judicial Code of the jurisdictional portion of the 1894 Act and is identical in scope with the 1894 Act. *First Moon* v. *White Tail,* 270 U. S. 243, 245 (1926); *Kennedy* v. *Public Works Administration,* 23 F. Supp. 771, 773 (W. D. N. Y. 1938); S. Rep. No. 388 pt. I, 61st Cong. 2d Sess. (1910) pp. 62, 63.

In *United States* v. *Eastman,* 118 F. 2d 421 (C. C. A. 9, 1941) certiorari denied 314 U. S. 635 (1941), this Court held that the 1894 Act did not permit a suit to enjoin the enforcement of certain timber-cutting regulations on trust allotments stating:

> It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right

> to sue the government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed.

So here, appellants are not asserting a right to an allotment which has been denied them. Rather they seek simply to review the administration of those allotments particularly with reference to taxation. The suggestion (Br. 16–17) that the *Eastman* decision has been overruled by the Palm Springs litigation which terminated in this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730 (C. C. A. 9, 1946) clearly lacks merit since that litigation concerned the right of Arenas to an allotment and not administration of the allotment after it was made.[2]

The language of the 1894 Act is plainly limited to suits to obtain allotments in the first instance. The parties are stated to be "the claimant as plaintiff and the United States as party defendant." The phrase "or who claim to have been unlawfully denied or excluded from any allotment," which is simply descriptive of the persons who may sue, does not enlarge the subsequent language of the Act.[3] The jurisdictional provision is limited to actions involving "the right * * * to any allotment." The Act then provides that the judgment "shall have the same effect,

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[2] The decision in *United States* v. *Hellard*, 322 U. S. 363 (1944) cited by appellants (Br. 17), is, as the trial court concluded (R. 31–33), plainly irrelevant since it related to special statutes governing the Five Civilized Tribes in Oklahoma.

[3] Like appellants here (Br. 13), the trial court in the *Eastman* case relied principally upon this phrase for the decision which was reversed by this Court.

when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." Obviously, the judgment sought by appellants could not be given any such effect.

Despite the restricted nature of the 1894 Act appellants argue that it should be given a broader meaning so that they may have a remedy (Br. 16). But, as this Court pointed out in the *Eastman* case "Enlargement of the right to sue the government for the redress of this character is solely a function of Congress." Cf. *Edwards* v. *United States* (C. C. A. 9, decided August 4, 1947). Moreover, adoption of appellants' contention would violate the settled rule that statutes waving sovereign immunity are to be strictly construed and enlargement of them by implication is not permissible, *United States* v. *Goltra,* 312 U. S. 203, 210–211 (1941); *United States* v. *Sherwood,* 312 U. S. 584, 590 (1941); *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654 (1947).

Thus, the dismissal of the suit as against the United States was clearly correct. The Government is not concerned with the issues arising between appellants and the individual defendants. Consequently, we shall not discuss the question whether the motions to dismiss filed by those defendants were well taken. However, we believe that attention should be called to the fact that, since jurisdiction may not be rested upon Section 24 of the Judicial Code, no basis for Federal jurisdiction appears. There is no allegation that more than $3,000 is involved and the complaint affirmatively alleges that the individual defendants are residents of Montana (R. 4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below insofar as it dismisses the suit against the United States, is clearly correct and should be affirmed.

A. DEVITT VANECH,
Assistant Attorney General.
JOHN B. TANSIL,
United States Attorney,
Billings, Montana.
ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C.

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